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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 933

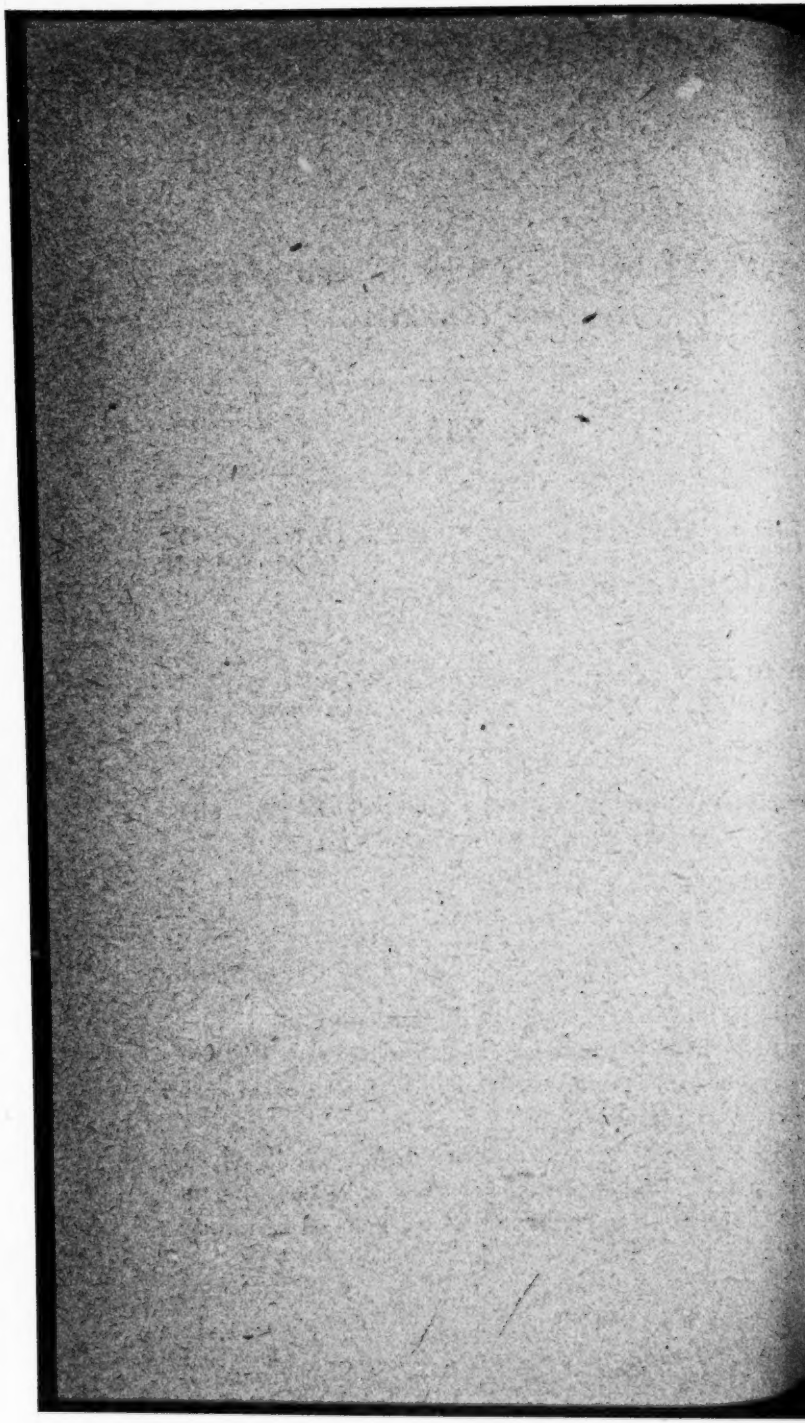
THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND THE TEXARKANA & FORT SMITH RAILWAY COMPANY, PETITIONERS,

vs.

ROAD IMPROVEMENT DISTRICT NO. 3 OF SEVIER COUNTY, ARKANSAS, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

JAMES B. McDONOUGH,
Attorney for Petitioners.



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OCTOBER TERM, 1922.

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THE KANSAS CITY SOUTHERN RAILWAY COMPANY AND THE TEXARKANA & FORT SMITH RAILWAY COMPANY, PETITIONERS,

vs.

ROAD IMPROVEMENT DISTRICT NO. 3 OF SEVIER COUNTY, ARKANSAS, ET AL., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

To the Honorable the Supreme Court of the United States:

The petitioners, The Kansas City Southern Railway Company and The Texarkana & Fort Smith Railway Company, corporations, and hereinafter referred to as petitioners, show to this court as follows:

The petitioners own and operate a line of railroad extending from Kansas City, in the State of Missouri, to the Gulf of Mexico and Port Arthur, in the State of Texas, said

line being approximately eight hundred miles in length and running through the States of Missouri, Kansas, Arkansas, Oklahoma, Louisiana, and Texas. Said petitioners are engaged in interstate commerce. Petitioners' line of railroad passes through Sevier County, State of Arkansas, and through Road Improvement District Number 3 of said Sevier County, State of Arkansas.

The Board of Improvement of said Road Improvement District and said district and the officers thereof are attempting to impose a local assessment against two miles of the railroad of the petitioners. The assessment is a so-called local assessment of alleged benefits. The total benefit assessment named was divided between the main line, buildings, and side tracks. Against the maine line the assessment was $3,500.00 per mile, or a total of $7,000.00. Against the side tracks, the assessment was $5,000.00, and against the buildings, $9,270.00. The side tracks and buildings were located on the right of way, and all the buildings, side tracks, and main line were used exclusively for railroad purposes.

The Board of Improvement of Road Improvement District Number 3 of Sevier County and the district itself, as a body politic and corporate, and the Commissioners thereof are the respondents. For convenience the said parties will be referred to as respondents.

The Road Improvement District was organized under Act 338 of the acts of the General Assembly of Arkansas of 1915. See acts of 1915, page 1400. As originally laid out, the Road Improvement District did not include the property of the petitioners. Later the boundaries of said district were extended so as to include said property of petitioners. In

extending the boundaries the district was so laid out as to include one-third to one-half of the town of De Queen, the county seat of Sevier County, Arkansas, although it was admitted by the respondents and their counsel that the entire town of De Queen would be benefited by the construction of the road. The district was a narrow district, being two miles wide at De Queen, and extending east and southeast a distance of eighteen or twenty miles to the eastern boundary of Sevier County. The width of the district ranged from two miles to probably eight or nine miles. The farm lands in the district have benefits assessed against them ranging from $2.00 per acre to an average of $10.00 and $12.00 an acre. It is contended by the petitioners that the farm lands were systematically undervalued, and that the petitioners' property was overvalued. The total acreage in the district was about 64,000 acres. The petitioners have in the district twenty-four acres of right of way. The total assessed benefits in the district on all the property amounted to $510,033.00. The total value on acreage and town lots amounted to $897,660.00. The total value on petitioners' property was $129,615.00. The total assessments on the farm lands averages about $9.00 per acre. The total assessment on the petitioners' property amounts to $880.00 per acre. The result of the action of the assessors, which was confirmed by the County Court, by the Circuit Court, and by the Supreme Court of the State, is to place an assessment against the property of petitioners of $10,635.00 per mile. The only basis for the assessments under the decisions in Arkansas, as well as under the decisions of this court, is that property of the petitioners will be enhanced in value in a sum equal to the assessments of benefits which are placed on the property.

Under the Alexander Law, heretofore cited, only property located within the District can be assessed for these local taxes. The total assessment of $21,270.00 was assessed upon the theory that the two miles, which property included the buildings and the sidetracks and the main line of petitioners, would be enhanced in value in said sum of $21,270.00. The undisputed evidence of the assessors and the commissioners showed that the only benefit which the petitioners' property could derive from the construction of the highway was increased traffic. It was not attempted to show that there was any other basis for an enhancement in the value of the petitioners' property other than the conjectural, probable increase in the traffic or tonnage of the petitioners, due to the development of the country through which the road was to pass. From De Queen, the western end of the disttrict and of the highway, to Lockesburg in the same county, a distance of about fifteen miles, there was another railroad known as the De Queen and Eastern Railroad. Lockesburg was the commercial center of all the eastern part of the road district. The farm products in the territory around Lockesburg were ordinarily delivered for transportation to the De Queen & Eastern Railroad Company, and the latter carrier hauled said products to De Queen, and if destined beyond De Queen, to the north or south, delivered them to the petitioners. Some of the products, although not many, were delivered to another railroad, which extended from De Queen to Valiant to the southwest in the State of Oklahoma. The assessors in substance testified that in their opinion there would be a benefit to the railroad property, but they admitted on cross-examination, that the benefit would be indirect. Their only ground of belief, that there would be a benefit, was that

there would be an increase in tonnage. Assessor Brady testified that the railroad, by reason of the improvement "absolutely gets no more products from the farm than it got before the road was built." He further said that if the railroad did not get to haul an ear of corn nor a bale of cotton more, then the railroad got no benefit. The same witness further testified that the highway would not enable the farmers in the district to produce a single blade of grass or ear of corn more than they are now producing. The same assessor then admitted that in making the assessments, they taxed the railroad for a benefit that went to the farm, at least in part. Generally, the theory upon which the exorbitant sum of $21,270.00 was laid on the two miles of petitioners' property was that the farmer would have an easier access to the market. The trial court stated that such was the fact. The petitioners introduced testimony covering the entire district, and showing in detail the amount of cultivated land, the amount of uncultivated land and the amount of land that can never be placed in cultivation. From 75 per cent to 90 per cent of the land that can ever be cultivated, is actually in cultivation. The district has much fertile land which has been in a high state of cultivation for a long number of years. The farm lands are worth probably from $5.00 an acre to $100.00 an acre, and even more. The evidence shows that the conjectural and possible benefit due to increased tonnage cannot be sustained, because there is not enough uncultivated land in the district to increase the tonnage so as to justify an enhancement in petitioners' property amounting to $21,270.00. In addition, it is shown in the record that the two miles of railroad within the district cannot alone earn the increased tonnage, and therefore the earnings due

to increased tonnage must be earned by the entire road. It is also shown that the two miles constitute less than one-fourth of one per cent of the entire line. It is also shown that the petitioners, out of each $1,000.00 of gross revenue hauled, received a profit of $237.30, the operating ratio of the petitioners being 76.27 per cent. The assessors admitted that they were advised by the commissioners that there would be a bond issue of about $200,000.00, and the bond buyers required an assessment of at least $550,000.00. Most of the farm lands were assessed according to a zone method; some of the assessments running as low as $2.00 per acre. The zone method was not applied to the petitioners' right of way. The evidence was undisputed that the increased tonnage would be handled by the entire line, and the enhancement would therefore extend beyond the confines of the district. It was shown that to add $21,270.00 to the two miles of road in the district, would increase the value of the entire line $8,500,000.00. It was also shown by the evidence of E. Phelps, Tax Commissioner, that if the highway increased the tonnage so as to bring in an increased gross revenue of $1,000.00, petitioners would enjoy a net profit of $237.30. That would be an earning of thirty and one-half cents (30½¢) for each mile of railroad. Therefore, the mileage within the district would earn sixty-one cents (61¢). By capitalizing that, the railroad, by reason of the construction of the highway, would have added to it the value of $10.17. Under those facts, any assessment reasonably in excess of that amount would be illegal and void.

The petitioners called their agriculturists, traffic men, operating men, and many other representatives, and proved by them that there would be no increase in traffic by reason of

the construction of this highway, and there would be no benefit whatever to the property of the petitioners. The assessors and the commissioners did not give the slightest ground for contending that there would be an enhancement in traffic, except a general belief to that effect. The petitioners introduced the county surveyor and the other witnesses above referred to, showing the exact condition of almost every acre in the district. One of the assessors, Brady, testified that he owned forty acres of land which was worth $2,000.00. That forty acres was valued on the tax books at $300.00. Benefits were assessed against it at $180.00. If the assessors had assessed petitioners' property at the same rate, petitioners' taxes could not exceed $1,080.00. The petitioners contended that the evidence of the assessors and the commissioners and all the other evidence of the respondents utterly fails to show that there will be any enhancement in the value of the petitioners' property. Petitioners therefore contend that the assessment against their property in the district in the sum of $21,270.00 is confiscatory, discriminatory, unfair, unjust, illegal, and void, and deprives them of their property without due process of law, and denies to them the equal protection of the law, contrary to section one of the Fourteenth Amendment to the Constitution of the United States.

This question was raised, as required by the Alexander Law, by the petitioners in the County Court. The said Alexander Law, as this court held in the case of The Kansas City Southern Ry. Co. *vs.* Road Improvement District No. 6, 256 U. S., 658, fixed no guide for making assessments. The assessors in this case admitted that they were not familiar with railroad property, railroad earnings, or returns on rail-

road investments. They show no sound basis upon which they can sustain the enormous assessment leveled against petitioners' property. Section 11 of the Alexander Law (Arkansas Acts, 1915, p. 1412) requires the assessors to assess the property within the district, benefits received by said property by reason of the improvement.

As before shown, benefits cannot be assessed unless there will be an enhancement. As provided in sections 13 and following, the petitioners appeared in said County Court, as required by the said Alexander Law, and alleged in writing that the said assessments were unjust, unfair, confiscatory and void, and deprived the petitioners of their rights as guaranteed to them by section 1 of the Fourteenth Amendment to the Constitution of the United States. It was also alleged by petitioners, that said assessments were excessive, unfair and unlawful, in violation of said Constitution of the United States. It was further contended that said assessments were an unlawful burden on interstate commerce, contrary to section 8 of article I of the Constitution of the United States.

Those objections made in the County Court were renewed and preserved in the Supreme Court of the State. In each court the petitioners were denied relief. The sole question, therefore, involved here is whether upon the undisputed evidence the said assessments are in violation of the petitioners' rights under section 1 of the Fourteenth Amendment to the Constitution of the United States.

By reason of the above facts, which are shown in the record, the petitioners claim that there was no evidence in the record to show that the property of the petitioners would be enhanced in value in any sum whatever. They further

claim that the action of the assessors, the County Court, the Circuit Court of Sevier County, and the Supreme Court of the State of Arkansas, in affirming said assessments, denies to the petitioners the equal protection of the laws, and takes from them their property without due process of law, contrary to the Constitution of the United States, above referred to, said assessments being arbitrary, unjust, confiscatory, unreasonable, discriminatory, and void.

Petitioners further asserted in all the lower courts, that their property was not benefited, and could not be benefited by the construction of the highway, and that the assessments were not alone upon the property in the district, but upon petitioners' property, outside of the district, and upon the business and commerce of the petitioners. By reason of the decisions of the lower courts, including the Supreme Court of the State of Arkansas, there was drawn in question the right, privilege, and immunity claimed by the petitioners under section 1 of the Fourteenth Amendment to the Constitution of the United States, and the decision of said Supreme Court of the State of Arkansas, by affirming said assessments, was against said right, privilege, and immunity of the petitioners, so set up and claimed by said petitioners under said section 1 of the Fourteenth Amendment to the Constitution of the United States, and under the commerce clause of said Constitution. Petitioners therefore respectfully submit that the questions involved, briefly stated, are as follows:

Questions Involved.

1. Upon the undisputed evidence in the proceedings herein, there is no testimony to show that the property of

the petitioners will be benefited by the highway contemplated, and proposed to be built by Road Improvement District No. 3, of Sevier County, Arkansas.

2. In making the assessments against the property of the petitioners, the assessors and commissioners included in the valuation of the property of the petitioners the tangible and the intangible property of the petitioners, and included in said value a part of the personal property of the petitioners, and at the same time assessed benefits against the farms and lands in said improvement district without assessing any of the personal property on said farms, and assessed in said district no personal property, except that which belonged to the petitioners.

3. In making said assessment of benefits the assessors and commissioners included property and property rights of the petitioners which are not located within said road district, and included the business and good will of the petitioners, and in part some of its property outside of said district, and thereby levied assessments upon property of petitioners not in the district, and thereby deprived the petitioners of their property without due process of law, in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States.

4. In making the assessments against the property of the petitioners, the assessors and commissioners took into consideration the use of the property of the petitioners and did not take into consideration the use of the other real property located in said district.

5. In making said assessments against the property of the petitioners, the said assessors and commissioners extended the

line of said improvement district for the purpose of including in said district, the two miles of the right of way and property of petitioners, and extended said district only far enough to include said property of the petitioners, and purposely left out of said district more than one-half of the real property located in the town of De Queen, although all the property located in the town of De Queen was benefited. This leaving out of the real property in De Queen, and not taxing the same, was an unlawful and unconstitutional discrimination against the petitioners, and renders said assessment illegal and void.

6. The assessment against the property of the petitioners of twenty-one thousand two hundred and seventy dollars ($21,270.00) as a benefit is confiscatory, arbitrary, illegal, and void, because it is impossible for the property of the petitioners to be enhanced in value to that extent. Such assessment therefore takes the property of the petitioners without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States.

7. The Supreme Court of Arkansas erred in holding that the act of the General Assembly of the State of Arkansas, approved February 7, 1920, was a legal legislative determination of the correctness of said assessments. The said act was passed after the issues in this cause were made up, and is an unlawful attempt to exercise judicial power by the legislative department of the government, and is subject to all the constitutional objections made herein, as to said assessments, and the said act, if enforced, will deprive these petitioners of their property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States.

8. The Supreme Court of Arkansas erred in holding that there was any substantial evidence to support the findings of the Circuit Court and of the county court.

9. The assessors and commissioners, in making the said wrongful assessments against the property of the petitioners, based their action solely upon the contention by said assessors and commissioners that the construction of the highway in question would result in the general up-building and general improvement of the surrounding country, and would thereby result in bringing increased traffic to the petitioners at some time in the future. It was contended by said assessors and commissioners that that probable and conjectural increased revenue would enhance the value of petitioners' property within the district, in a sum equal to the assessments made against petitioners' property. The petitioners assert that the probable increased traffic is not a special and peculiar benefit, and an enhancement of value within the meaning of the law, and that such a construction of the Act No. 338, above referred to, deprives the petitioners of their property without due process of law, contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States.

10. The plan of assessing the main line at $3,500.00, and the side tracks separately and with an additional valuation is double taxation. The side tracks are in reality a part of the main line system. Under improvement district laws said side tracks have no separate existence or valuation. Therefore, to tax the main line, and then tax an additional sum on the side tracks, is double taxation.

11. The main line valuation legally, and in effect includes the buildings. The assessors and commissioners assessed the

buildings and side tracks separately, and at the same time included said buildings and side tracks in the main line valuation, thus resulting in double taxation, both as to the buildings and side tracks, and necessarily, therefore, creating double taxation on all the property of the petitioners.

12. The assessors and commissioners in assessing property other than railroad property, did not assess the improvements and the land separately. If the improvements on other real property were assessed at all, they were assessed as a part of the real property. The side tracks and buildings of petitioners are a part of their real property, and if assessable at all, they are included in the real property. The assessors and commissioners, therefore, adopted a different plan, and in effect excluded the improvements on other real property, and included the side tracks and buildings on petitioners' property.

13. There is no evidence in the record to show that the building of the proposed highway would enhance the value of any of the side tracks or buildings of the petitioners, and therefore there is no basis for assessing any benefits against such side tracks or buildings.

14. The assessors and commissioners assessed the alleged benefits on farm lands and other real property at an undervaluation of said property, and assessed the alleged benefits against the property of the petitioners on an overvaluation, thus discriminating against the petitioners, and depriving them of their property without due process of law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States.

15. The law under which the assessments in question have been made against the property of petitioner was in-

tended to and does provide a ratio of taxes assessed against the property of your petitioners to benefits received by such property, if any, much higher than is the ratio of taxes assessed against the other property in the district to the benefits accruing to such other property.

16. The theory upon which large benefits are assessed against the property of petitioners is based upon a pretended expectation of future earnings and distributed values having no foundation in fact, while other property in the district is assessed according to area and position, and with a reasonable probability that such other property will receive substantial benefits.

The petitioners therefore respectfully submit that the decision of the Supreme Court of the State of Arkansas upon the facts above set forth, and the record shown herein, is erroneous by reason of each of the assignments above set forth.

Wherefore, your petitioners say that because of the denial of their rights under the said Sections of the Constitution of the United States above referred to, said petitioners are entitled to a writ of certiorari from this court, under Section 237 of the Judicial Code as amended.

In compliance with the rules of this court, your petitioners furnish and herewith attach as an exhibit to this petition, a duly certified copy of the entire transcript of the record in this cause, including the proceedings of the Supreme Court of the State of Arkansas. Your petitioners respectfully state that there has been granted to said petitioners a writ of error by the Chief Justice of the Supreme Court of the State of Arkansas, and the record on said writ of error is now on file in this court. Petitioners make this application for

certiorari to the end that this cause may be presented to this court without any question as to the procedure. Petitioners ask that the certified copy of the record now on file, in addition to the writ of error, be taken as the certified copy on this petition.

Wherefore, your petitioners respectfully pray that a writ of certiorari may issue out of and under the seal of this court, directed to the Supreme Court of Arkansas, to command said court to certify and send to this court on a day certain, to be therein designated, a full and complete transcript of the record and the proceedings of said Supreme Court in said cause therein, entitled The Kansas City Southern Railway Company and The Texarkana & Fort Smith Railway Company against Road Improvement District Number 3 of Sevier County, Arkansas, and numbered in said Supreme Court, 7392, to the end that said cause may be reviewed and determined by this court, as provided by the provisions of the Act of Congress known as the Judicial Code, by the amendments thereto, and that said cause be reversed, and that the petitioners may have such other and further relief in the premises as to this court may seem appropriate, and in conformity to said Acts of Congress, and that said judgment of the Supreme Court of the State of Arkansas be set aside, and that said assessment against the property of the petitioners be set aside.

Respectfully submitted,

THE KANSAS CITY SOUTHERN
RAILWAY COMPANY,
THE TEXARKANA & FORT SMITH
RAILWAY COMPANY,
By JAMES B. McDONOUGH,
Their Attorney.

AFFIDAVIT.

STATE OF ARKANSAS,
County of Sebastian, ss:

I, James B. McDonough, on oath, state that I am counsel for The Kansas City Southern Railway Company, and that the matters and things set forth in the above and foregoing petition are true to the best of my knowledge and belief.

I further state that the officers of the said The Kansas City Southern Railway Company and The Texarkana & Fort Smith Railway Company are absent from the State of Arkansas.

JAMES B. McDONOUGH.

Subscribed and sworn to before me this 30th day of March, 1923.

[SEAL.] ANNA ALTMILLER,
Notary Public.

[Endorsed:] The Kansas City Southern Railway Company and The Texarkana & Fort Smith Railway Company, petitioners, *vs.* Road Improvement District Number 3, of Sevier County, Arkansas, *et al.*, respondents. Petition for writ of certiorari to the Supreme Court of the State of Arkansas.

[Endorsed:] File No. 29,505. Supreme Court U. S. October Term, 1922. Term No. 955. The Kansas City Southern Ry. Co. *et al.*, P. E., *vs.* Road Improvement District No. 3, etc., *et al.* Petition for writ of certiorari. Filed April 2, 1923.